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No. 92-1936

In The

Supreme Court of the United States

October Term, 1992

FRANKLIN YEAGER, WALTER BRANDT, DON C. YEAGER, AND MARK YEAGER,

Petitioners,

v.

CITY OF McGREGOR, McGREGOR VOLUNTEER FIRE DEPARTMENT, AND TOM KIRK,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

FULBRIGHT, WINNIFORD, BICE & MARABLE
A Professional Corporation
P. O. Box 7575
Waco, Texas 76714-7575
(817) 776-6000
(817) 776-8555 [FAX]

ANDY McSWAIN
State Bar No. 13861100
NOLEY R. BICE, JR.
State Bar No. 02292000
Attorneys for Respondent Tom Kirk

June 29, 1993

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

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TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

Tom Kirk, Defendant/Appellee in the courts below, respectfully submits this Brief in Opposition to the Petition for Writ of Certiorari filed by Franklin Yeager, Walter Brandt, Don C. Yeager and Mark Yeager ("the Petitioners"), and requests that this Court deny the petition and decline to review the judgment and opinion of the

United States Court of Appeals for the Fifth Circuit that was entered on January 5, 1993.

STATEMENT OF THE CASE

A. Statement of Facts

Tom Kirk, Respondent herein, was a city council member and private citizen in the City of McGregor, Texas. He was not a member of the McGregor Volunteer Fire Department (VFD) nor did he hold any offices with the VFD or have anything to do with it. Despite the fact that he had nothing to do with the VFD, he was sued by the Petitioners herein when they were dismissed by vote of the membership of the VFD.

On November 19, 1988 Franklin Yeager, Walter Brandt, and Don C. Yeager told a newspaper reporter that the VFD engaged in racially discriminatory practices. (TR- Vol. 4; Exh. 5, p. 56, line 13-p. 59, line 18).[1] On December 1, 1988 the Petitioners appeared at a public meeting of the McGregor City Council to raise questions concerning claimed financial irregularities existing within the VFD. The minutes of the meeting show that City Councilman Tom Kirk, rather than attempt to cover up any claimed improprieties of the City or the VFD,

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[1] The references to Volume 4 of the record contain no page numbers, because Volume 4 consists primarily of a Motion for Summary Judgment and Response thereto. Each of those documents contains several exhibits. Because Volume 4 of the record is not paginated, reference is made herein to the Exhibits and their specific pages if possible.

responded to these questions by asking that the City of McGregor provide the services of the city auditor to conduct an audit of the records of the VFD for the previous five years. (TR- Vol. 4; Exh. 1 pp. 2-3). As pointed out by the District Court, these claimed improprieties dealt with the non-use, rather than the misuse of VFD funds. Petition, Appendix B, at 6.

The *only* alleged action shown by evidence in the record and attributable to Kirk followed this meeting. It consists solely of a remark allegedly made by Kirk to Ronnie Spradley and John Blake – "I want them out." Kirk testified under oath that he did not make any comments after the meeting about removing the Plaintiffs from the VFD. (TR- Vol 2; p. 338). This is borne out by the depositions and affidavits of Blake (Fire Chief) and Spradley (President of VFD). (TR- Vol. 4, Exh. 8, pp. 39-40; Vol. 4, Exh. 2; Vol. 4, Exh. 1). Hank Smith, however, allegedly heard Tom Kirk, immediately following the City Council meeting, state "I want them out." (TR- Vol 2; p. 338).[2]

After the adjournment of the city council meeting on December 1, 1988, a quorum of members of the VFD (which did *not* include Tom Kirk, since he was not a member) convened for a specially called meeting. Kirk

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[2] The only other evidence in the record to which Petitioners point concerning Kirk is a group of double hearsay statements by different participants in a Thanksgiving Day dinner, all reciting their own versions of the same visit. This consisted of the claim by some Petitioners and family of a conversation with Ronnie Spradley in which he indicated that Kirk wanted to see them out of the VFD.

did not attend, speak, or vote at this meeting. At the meeting, a motion was made by a member to dismiss Walter Brandt, Don C. Yeager, Franklin Yeager, and Mark Yeager. The motion was seconded and overwhelmingly carried a secret ballot vote of the membership. (TR- Vol. 4; Exh. 7). Tom Kirk was not a member of the VFD, was not at that meeting, had no standing to vote, had no control over the proceedings, did not buttonhole members, or address the group. (TR- Vol. 2; pp. 346-47) (TR- Vol. 4; Exh. 3).

There is no evidence to the contrary. Nonetheless, because of Petitioners' animosity towards him, Kirk, individually, was a target of this suit along with the VFD, the City of McGregor and Spradley (VFD President) and Blake (Fire Chief).

B. Course of Proceedings and Disposition in the Court Below.

Franklin Yeager, Walter Brandt, Don C. Yeager, and Mark Yeager, Petitioners herein, filed a Complaint in the United States District Court, alleging that they had been discharged from the VFD because of public statements they made concerning claimed racial discrimination and financial irregularity within the VFD.

After a significant amount of discovery was conducted, the City of McGregor, VFD, and Tom Kirk each filed Motions for Summary Judgment. (TR- Vol. 2; pp. 309-360). Defendants Blake and Spradley, the alleged co-conspirators with Kirk, were dismissed by agreement of Petitioners. The Motions for Summary Judgment were

properly granted by the District Court. (TR- Vol. 1; pp. 659-670).

Petitioners claim that as to Kirk, this decision rested solely upon the State Actor status of the VFD. Petition at 6. Contrary to that assertion, the District Court's Judgment in favor of Tom Kirk rested upon the fact that Kirk was not a member or official of VFD, and no evidence in the record showed that any action of his proximately caused the dismissal of Petitioners. "More importantly, the *only* action attributed to Defendant Kirk is the statement 'I want them out.' Petitioners have failed to present summary judgment evidence that this action caused their injury." District Court Opinion, Petition Appendix B, at 10. The Fifth Circuit Court of Appeals properly affirmed this judgment of the District Court.

SUMMARY OF THE ARGUMENT

A. No Genuine Issue of Material Fact Shown.

As pointed out by the District Court and the Fifth Circuit, the Petitioners in the case at bar completely failed to establish any connection between the claimed activity of Tom Kirk and the injuries or damages they alleged. Again, the only alleged act of Tom Kirk supported in the record by non-hearsay evidence is the one statement attributed to him that he wanted Petitioners out of the VFD. Kirk stated by deposition that the statement was never made, and that fact was confirmed by Blake and Spradley. (TR- Vol. 1; p. 665).

At best, the Petitioners can only create an issue of fact as to whether or not the statement was made. Even assuming that Kirk did make the statement that he wanted them "out," it was merely an expression of his opinion. There is no showing in the record that Kirk had any control over the membership of the VFD, and it was a separate entity in which he was not a member and had no right to vote.

B. Tom Kirk Caused No Damages.

The Petitioners have wholly failed to establish any causal connection between the claimed statement by Kirk and their injuries. Tom Kirk was not an officer or member of the VFD, was not present at the meeting of the VFD in which the Petitioners were voted out, nor would he have been allowed to cast a vote at that meeting. That was a privilege open only to the members of the VFD. The Petitioners were voted out of the Fire Department by an overwhelming majority of its own members. The two people Kirk allegedly talked to, Spradley and Blake, each possessed only one vote, and one did not even vote. (TR-Vol. 4; Exh. 1, 2, 3). Even if Blake had voted *for* the Petitioners remaining in the VFD, the vast majority of the other members would have removed them. (TR- Vol. 4; Exh. 3). Tom Kirk clearly did not cause the Petitioners' dismissal from the VFD and cannot be held liable for it.

C. There is No Evidence of Any Conspiracy.

In this case, there is no evidence of any agreement, or of any acts in furtherance of such an agreement. Further,

this case is very analogous to the Fifth Circuit's opinion in *Mylett v. Jeane*, 879 F.2d 1272 (5th Cir. 1989) and also to the shoplifter arrest conspiracy cases. In *Mylett*, and in the shoplifter conspiracy cases, the Courts have held that the providing of information (which is essentially the claim herein) is not sufficient to establish any type of "conspiracy" with state actors on the part of the private citizen.

D. Kirk's Statement Protected by Free Speech.

Even assuming that Kirk made the statement claimed by the Petitioners, that is the only action complained of by Kirk and it is not sufficient to support a claim for § 1983 conspiracy. Kirk has the same First Amendment right as Petitioners, and is free to suggest his opinions or views to those in the VFD, just as Petitioners. Expression of his views is accordingly protected by the First Amendment, and no § 1983 liability can rest upon that expression of his opinion and wishes.

ARGUMENT AND AUTHORITIES

The sole basis of Petitioners for urging the claims against Kirk is that of an unsupported broad brush claim of "conspiracy." For the reasons set out below, the District Court properly granted summary judgment for Kirk, and that judgment was properly affirmed by the Fifth Circuit.

A. Summary Judgment for Kirk Properly Granted.

A party seeking summary judgment must demonstrate that there is no actual dispute as to any material fact or element of the cause of action or defense upon which it is sought. Fed.R.Civ.P. 56(c); *Celotex Corp. v. Catrette*, 477 U.S. 317 (1986). In this case, there is no material issue of fact as to any question of liability or causation concerning Kirk. Once Kirk demonstrated the absence of a material fact issue, the Petitioners had a duty to raise factual assertions that would preclude the granting of summary judgment. *Celotex*, 477 U.S. 317; *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). As shown by the record, they completely failed to do so. For this reason, the Petition for Writ of Certiorari contains very little guidance to support Kirk's presence as a Defendant in the suit, and in this Appeal.

There is no evidence that establishes any control by Kirk over VFD actions. Instead, the evidence conclusively shows Kirk had no control over the members of the VFD when they voted to dismiss Petitioners at a meeting that Kirk did not attend. Nonetheless, they sued him because of that dismissal. Summary judgment was properly granted as to Kirk.

B. No Damages or Injury Proximately Caused by Kirk.

Petitioners were not employees of the City of McGregor, nor were they employees of the VFD. The Fire Department in McGregor is nothing more than what its name implies, a volunteer fire department. Petitioners

became associated with the VFD just as all other members – through an application, and acceptance by vote of the general membership. The procedural operations of the VFD are dictated by the charter and/or bylaws of the VFD. The bylaws provide for the disassociation of any member from the VFD by a vote of the membership. Petitioners were not voted out of the VFD by any single person, but by a vote of its general membership. Kirk was not ever a member of the VFD, nor was he present at the December 1, 1988 meeting. There is no evidence that Tom Kirk had any control over the voting of the general membership of the VFD. The Fire Chief and the President of the VFD (to whom he supposedly spoke) did not control or dictate the voting of the general membership. They each had just one vote. The Fire Chief and President of the VFD could neither hire, nor fire, members of the department. Under the VFD bylaws, that function belongs solely to the general membership of the VFD, and is executed, as in this case, by way of their voting. (TR- Vol. 4; Exh. 3). The act of disassociating the Respondents from the VFD was *solely* the act of the voting membership of the VFD. Tom Kirk could not, and did not, participate in that vote, nor did he attend the meeting in which there was a vote. (TR- Vol. 4; Exh. 1, 2, 3).

Accordingly, as correctly pointed out by both the District Court and Fifth Circuit there is no evidence of any causal connection between the alleged comment by Kirk, any activity of the leadership of the VFD, or the vote of the membership of the VFD. A person without the power to cause an improper state action cannot be held liable for that state action. *Morgan v. Tice; Morgan v. Whitt*, 862 F.2d 1495 (11th Cir. 1989). VFD President Spradley

has testified that he did not vote on the occasion in question. Fire Chief Blake only possessed one vote. Even if Blake had voted against dismissal, the overwhelming majority of the rank and file membership of the VFD voted to disassociate the Petitioners. The facts at bar do not even begin to approach actionable conduct by Kirk, let alone proximate causation.[3] Before Kirk can be liable under § 1983, there must be some proof of causation. The alleged injuries of the Petitioners could only have been caused by the membership of the VFD, through its voting. The District Court, recognizing this fact, stated as to Kirk that:

> the *only* action attributed to Respondent Kirk is the statement "I want them out". Petitioners have failed to present summary judgment evidence that this action caused their injury.

Petition, Appendix B, at 10. Under the facts of this case Tom Kirk did not cause any damage to the Petitioners, nor did he have the power to cause any such damage, as a matter of law. Petitioners presented no summary judgment evidence to the contrary.

C. There Is No Evidence Of Any Conspiracy.

The Petitioners have produced *no* evidence to support the claims of conspiracy to deprive the Petitioners of their civil rights between Kirk, Fire Chief Blake, and VFD

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[3] *Neubauer v. City of McAllen, Texas*, 766 F.2d 1567, 1577 (5th Cir. 1985); *Bowen v. Watkins*, 669 F.2d 979, 985 (5th Cir. 1982); *Reimer v. Smith*, 663 F.2d 1316, 1322 (Note 4) (5th Cir. 1981); *Gorman Towers, Inc. v. Bogoslavsky*, 626 F.2d 607, 610 (8th Cir. 1980).

President Spradley. In fact, despite this claim of conspiracy Blake and Spradley were voluntarily dismissed from this lawsuit by the Petitioners. (TR- Vol. 1; p. 660). Even though Petitioners make reference to *Dennis v. Sparks*, they fail to note that the conspiracy claim therein was based upon a "corrupt" act by the private individual – that of bribing a judge. That is certainly not the case here, and there is *no* evidence on the record of any such type of corrupt behavior or influence on the part of Kirk. *See Video International Production v. Warner-Amex Cable Com.*, 858 F.2d at 1075, 1084 (5th Cir. 1988).

The Petitioners have failed to properly and sufficiently plead and prove a conspiracy claim under § 1983. Conspiracy claims under § 1983 require a "heightened pleading standard demanding special particularity in civil rights complaints." *Hobson v. Wilson*, 737 F.2d 1 (D.C. Cir. 1984), *cert. den'd*, 470 U.S. 1084 (1985). The *Hobson* court quoted with approval the Second Circuit's pleading requirement for such actions:

> Complaints containing only "conclusory," "vague," or "general allegations," of a conspiracy to deprive a person of constitutional rights will be dismissed . . . [as] diffused and expansive allegations are insufficient. . . .

Hobson, 737 F.2d at 4, quoting *Ostrer v. Aronwald*, 567 F.2d 551, 553 (2d Cir. 1977); *see also Martin v. Malhoyt*, 830 F.2d 237, 258 (D.C. Cir. 1987). In the case at bar, the Petitioners' allegations and alleged "proof" of conspiracy against Kirk are conclusory at best. There has been no offering of any competent evidence of any conspiracy involving Kirk, nor does the Petition reveal any basis for that claim.

Petitioners must show by competent evidence *an agreement to conspire*. *Crowe v. Lucas*, 595 F.2d 985 (5th Cir. 1979). There was no such agreement, nor is there any evidence of such an agreement in this case. Any opinion expressed by Kirk can in no way constitute the requisite agreement to conspire. *Mylett*, 879 F.2d 1272 (§ 1983 conspiracy suit against co-worker for urging firing dismissed because no basis for § 1983 conspiracy). Furthermore, Kirk's comment alone is not sufficient in and of itself to show a participation in any conspiracy. *Id.*, *Buschi v. Kirven*, 755 F.2d 1240, 1249 (4th Cir. 1985). In *Buschi*, the mere fact that the individual Defendant commented to others that the Plaintiff "should be disciplined" was not sufficient to support a conspiracy claim, even in light of the Plaintiff's claims therein of subsequent unfair treatment. *Buschi*, 755 F.2d 1249.

Shoplifter arrest conspiracy cases are also analogous. In those cases, courts have repeatedly held that when a private store owner swears out a complaint against another individual and that individual is picked up and arrested, the private store owner has no § 1983 conspiracy liability under ordinary circumstances.[4]

In both *Mylett*, and in the shopkeeper cases, the logic for not holding the private individual liable under the conspiracy theory is that the reporting of information by the private individual does not take away the discretion and the voluntary actions of the governmental unit given

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[4] *See Bartholomew v. Lee*, 889 F.2d 62 (5th Cir. 1989); *Simms v. Jefferson Downs Racing Association*, 778 F.2d 1068, 1078-79 (5th Cir. 1985); *Daniel v. Ferguson*, 839 F.2d 1124 (5th Cir. 1988); *Storie v. U.S.*, 629 F.Supp. 1174 (N.D.Miss. 1986).

the information, as that unit is either free to act or not act upon that information.

Accordingly, Kirk should not be treated less well than the Defendant Adams in *Mylett*, or the private shopkeepers (that send people to jail) in the merchant cases.

D. Kirk Enjoys Same Right of Free Speech as Petitioners.

Just as any other individual in the community, Kirk is entitled to possess and express opinions concerning local government issues and local organizations. The membership of the VFD may credit or discount any or all of the opinions offered to them. In this regard, Tom Kirk should not be singled out and treated any differently than any other citizen in McGregor. The expression of political or personal opinions of state actors are not actionable under § 1983. *Thomas v. News World Communications*, 681 F.Supp. 55 (D.C. 1988). The Petitioners claim that the VFD is a governmental entity and that Blake and Spradley are state actors. Assuming that to be true, without admitting the same, even if Kirk did express his opinions to them, it was an attempt on his part to petition his "government," which is protected speech. *Eastern Railroads President Conference v. Noerr Motor Freight Incorporation*, 365 U.S. 875 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965).

The *Noerr-Pennington* Doctrine also applies to § 1983 claims. *Warner-Amex*, 858 F.2d 1075. The mere petitioning of the government, as Kirk's alleged act here, is not sufficient to support a claim or submission of conspiracy. Rather, that type of corrupt activity as evidenced in

Dennis v. Sparks, 449 U.S. 24 (1980), is necessary to turn First Amendment petitioning into a § 1983 conspiracy. *Warner-Amex*, 858 F.2d at 1084. In *Dennis*, the important element that constituted the conversion of the private actors into § 1983 conspirators was the "corrupt conspiracy involving bribery of a judge." *Dennis*, 101 S.Ct. at 186; *Warner-Amex*, 858 F.2d at 1084. Here, as in *Warner-Amex*, there is not sufficient evidence in the record of any such corrupt conspiracy to require the denial to Kirk of the protection of the *Noerr-Pennington* Doctrine. Because the only activity complained of on the part of Kirk is *his* exercise of free speech rights, any liability based thereupon should be approached "with extreme care". *NAACP v. Claiborne Hardware Co.*, 458 U.S. 86 (1982).

CONCLUSION AND PRAYER

Tom Kirk, a private citizen, allegedly did only one thing wrong, and that was utter the single statement that he wanted Petitioners "out" of the VFD. There is no other evidence in the record that intimates or shows that the Petitioners' ultimate dismissal from the VFD was the result of anything Tom Kirk did, or the result of any § 1983 conspiracy, as claimed. Accordingly, the Fifth Circuit properly affirmed the summary judgment granted by the District Court of the Western District of Texas and correctly held that the Petitioners did not raise a fact issue supporting their assertion Kirk was a co-conspirator with state actors, and did not cause any damage to Petitioners.

Under any set of guidelines used by this Court for deciding whether to exercise its judicial discretion and grant review on writ of certiorari, this case does not warrant such review, as it is solely a factual determination of the prior courts based upon Petitioners' inability to present a viable factual claim in the Summary Judgment record. The Petitioners fail to demonstrate the existence of any issue worthy of writ of certiorari from this Court. The district court's granting of the Defendants' Motions for Summary Judgment was proper, and the Fifth Circuit correctly affirmed that judgment. Accordingly, Tom Kirk, Respondent, asks this Court to deny the petition for a writ of certiorari, and further requests all other relief to which he may be entitled.

June 29, 1993.

Respectfully submitted,

FULBRIGHT, WINNIFORD, BICE & MARABLE
A Professional Corporation
P. O. Box 7575
Waco, Texas 76714-7575
(817) 776-6000
Fax No. (817) 776-8555

ANDY MCSWAIN
State Bar No. 13861100
NOLEY R. BICE, JR.
State Bar No. 02292000
Attorneys for Respondent Tom Kirk